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TABLE OF CITATIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1267

MANUEL VACA, CALEB MOONEY, and
ERNEST F. KOBETT,
Petitioners,

vs.

NILES SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased,
Respondent.

MOTION OF SWIFT & COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Swift & Company hereby respectfully moves for leave to file a brief as amicus curiae in this case. The consent of counsel for the petitioners has been obtained. Counsel for respondent has refused his consent.

The opinion of the Supreme Court of Missouri in the instant case has set up an unreasonable and unworkable standard of fair representation of an employee by a union and would allow every individual grievant who is dissatisfied with the decision of his union with respect to the processing of his particular grievance to have the decision of the union reviewed by a court or jury regardless of whether the decision of the union was made in good faith.

The opinion of the Supreme Court of Missouri strikes directly at the authority of a union to represent its members in grievance procedures and raises questions as to the authority of a union to represent its members in the collective bargaining process. Because of the impact of the question of fair representation upon the continued existence of a sound grievance procedure with the concomitant rights of a company to rely on the authority of the bargaining representative in the grievance procedure and of union representatives to exercise their judgment in the handling of a grievance, Swift & Company should be entitled to file its brief herein. The effect of the opinion of the Supreme Court of Missouri concerns not only petitioners and unions in general but is of equal interest to Swift & Company and other employers who rely upon the authority of unions to represent their members in grievance proceedings and in the collective bargaining process.

Swift & Company desires that the Court in considering the specific issues in this case also give consideration to the broader aspects of the problems as they relate to Swift & Company and other employers who are parties to collective bargaining agreements.

The amicus curiae brief sought to be filed by Swift & Company is directed solely to the issue of the standard of fair representation of an employee by a union, and Swift

& Company does not in its brief take a position on the other issues raised in petitioners' brief.

WHEREFORE, Swift & Company prays the Court for leave to file the attached amicus curiae brief herein.

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AMICUS CURIAE BRIEF OF SWIFT & COMPANY

The amicus curiae brief of Swift & Company is submitted subject to favorable action on the motion for leave to file to which it is attached, counsel for the respondent having refused consent that it be filed.

I

INTRODUCTORY STATEMENT

A. Statement of the Case

The case at bar is the culmination of a proceeding instituted by Benjamin Owens, Jr., plaintiff, on February 13, 1962, in the Circuit Court of Jackson County, Missouri, at Kansas City. In this action plaintiff sought damages against the National Brotherhood of Packinghouse Workers* and Kansas City Local # 12 for failing to take his grievance against Swift & Company to arbitration. A verdict for damages in the amount of $10,300.00 in favor of plaintiff was rendered by the jury in the trial court, but the trial court set aside this verdict on the ground that plaintiff should have taken his claim to the National Labor Relations Board. Owens died on December 8, 1964, and on the appeal of his administrator the Supreme Court of Missouri reinstated the verdict and judgment of the trial court, subject to a remittitur by plaintiff in the amount of $300.00. The decision and opinion of the Missouri Supreme Court (397 S.W.2d 658) raised basic questions as to the nature of a union's obligations in administering the grievance and arbitration provisions of a collective bargaining agreement and as to the proper remedy for a claim that a union has failed properly to meet these obligations.

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*Now known as the National Brotherhood of Packinghouse & Dairy Workers.

A petition to this Court for a writ of certiorari was granted on the 6th day of June, 1966, and this Court, at the same time, pursuant to motion of Swift & Company, permitted Swift & Company to file an amicus curiae brief in support of the petition for certiorari.

B. Interest of Amicus Curiae

Swift & Company is engaged in business throughout the United States and employs approximately 45,000 persons in its United States plants and facilities. Of this total number of employees, approximately 32,000 are hourly-paid employees. Of this latter group, approximately 82.5% are in a bargaining unit for which various Unions are the collective bargaining representatives.

The petitioners involved in the case presented here were sued as representatives of and as a class representing the National Brotherhood of Packinghouse Workers* (hereinafter referred to as the "NBP & DW") and its Local No. 12 (hereinafter referred to as "Local No. 12"). The NBP & DW and its Local No. 12 are the collective bargaining agent for approximately 1,360 employees in a bargaining unit at Movant's Kansas City, Kansas, Meat Packing Plant. In addition, the NBP & DW, (and one of its several local unions) represent employees of Movant in bargaining units at seven other Swift & Company meat packing plants located in the United States. At these plants, such Union is the collective bargaining agent for a total of approximately 5,600 employees.

At still other meat packing plants of Swift & Company in the United States, approximately 12,400 employees are in the bargaining units represented by either the Amalgamated Meat Cutters and Butcher Workmen of North

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America (AFL-CIO) or the United Packinghouse, Food and Allied Workers (AFL-CIO). In units and facilities of Swift & Company other than meat packing plants, there are approximately 8,400 employees in about 317 separate bargaining units which are represented by unions. In sum total, Swift & Company is signator to more than 300 collective bargaining agreements with the various unions that represent the aforementioned employees.

For Swift & Company, as for other employers whose employees are represented by unions, it is essential that the collective bargaining relationship between the employer and the unions representing its employees be a workable system. Of vital importance in such a system is the existence of an orderly method by which grievances are to be processed and handled through the grievance procedure, including the right of the employer to rely upon the authority of the grievant's union representatives to settle or withdraw a particular grievance claim at some point in the grievance procedure without processing it further when such union representatives determine in good faith that the facts of that particular grievance warrant such disposition.

It is the opinion of Movant that the decision of the Supreme Court of Missouri, particularly as it relates to the standards of fair representation of an employee by his union through the grievance procedure, seriously undermines the orderly administration of the grievance procedure in every collective bargaining agreement and thereby serves to undermine the entire collective bargaining relationship.

C. Scope of This Amicus Curiae Brief

This brief is concerned solely with the question of standard of fair representation of an employee by a union

established by the Supreme Court of Missouri in the case at bar. Movant's brief takes no position on the other questions presented by the brief of petitioners in this action.

II

SUMMARY OF ARGUMENT

The Supreme Court of Missouri permitted respondent's decedent to have judgment for damages against his union for failing to carry his grievance to arbitration on the ground that there was evidence which might have justified an arbitrator in deciding the grievance in favor of respondent's decedent and in spite of the fact that respondent's decedent in the trial court failed completely to present substantial evidence showing that the union acted in bad faith or from discriminatory motive in failing to take the grievance to arbitration.

The standard of fair representation thus established by the Supreme Court of Missouri is contrary to the opinions and decisions of this Court and the spirit and purpose of the National Labor Relations Act and, if allowed to stand, will render the grievance procedure ineffective and undermine the collective bargaining process.

III

ARGUMENT

A. The Opinion of the Missouri Supreme Court Sets up an Unreasonable and Unworkable Standard of Fair Representation of an Employee by a Union

The Missouri Supreme Court in its opinion (397 S.W.2d 658) never came to grips with the fundamental question of whether substantial evidence had been introduced showing bad faith on the part of the Union defendants when they did not refer plaintiff's grievance to arbitration, the

fifth step in the grievance procedure set forth in the contract between Swift & Company and National Brotherhood of Packinghouse Workers* (Plaintiff's Ex. 2; R. 19, 20, 173). The Missouri Supreme Court only considered whether there was adequate medical evidence to justify a finding that plaintiff had a meritorious grievance (R. 216, 217).

The Supreme Court of Missouri, after disposing of the preemption questions (to which it directed its primary attention), points out that one of the defendants' alternative contentions was (397 S.W.2d 658, 665):

> ". . . that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance *since there was not adequate medical evidence to show that plaintiff had a meritorious claim.*" (Emphasis supplied.)

The Missouri Supreme Court then (397 S.W.2d 658, 665) "concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff", but the court justified its conclusion by summarizing the medical evidence in favor of plaintiff, indicating a belief that the plaintiff made a submissible case by presenting substantial medical evidence in support of his grievance.

This approach taken by the Missouri Supreme Court was a reversal of the proper procedure, which would have involved, not a determination of whether there was substantial medical evidence supporting Owens' grievance, but whether the medical evidence supporting the Union's position was so devoid of substance as to justify a finding of bad faith on the part of the Union. Bad faith on the part

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*Now known as the National Brotherhood of Packinghouse & Dairy Workers.

of the National Union could not be shown merely by the presentation of medical evidence supporting the merits of plaintiff's grievance. An inference of bad faith based upon medical evidence could only be justified by a determination that there was no substantial medical evidence justifying the National Union's position. The Missouri Supreme Court simply overlooked this basic issue and, apparently inadvertently, and without regard for the consequences, established a standard of fair representation that would permit an employee to dictate the extent to which his grievance would be pursued so long as he could present any substantial evidence in support of his grievance.

Nowhere in the opinion of the Missouri Supreme Court is there any suggestion that that court ever considered the question of whether or not there was substantial medical evidence supporting the Union's position. The trial record, however, shows clearly that there was substantial (indeed, almost overwhelming) medical evidence supporting the Union's position. The original basis of Swift & Company's objection to Owens' returning to work was the opinion of Dr. Saper, the company doctor, who concluded and told Owens that Owens' physical condition was bad and his blood pressure high (R. 39, 42, 43). Although Dr. Saper was a Swift & Company doctor, there was no suggestion in the record that either he or anyone else at Swift & Company had any intention or motive to discriminate against Owens. As a matter of fact, Owens' counsel contended, and the Missouri Supreme Court found, that there was no discrimination against Owens by Swift & Company (R. 215). The opinion of Dr. Saper was later substantiated by Dr. Morris of the Kansas University Medical Center (defendant's Ex. 17; R. 48, 51, 186). The company's medical report as well as the medical report obtained by Owens (plaintiff's Exhibits 1 and 3; R. 18, 19, 172, 178, 179)

were reviewed at the fourth step meeting. At that meeting Swift & Company took the position that plaintiff's medical reports, as represented by plaintiff's Exhibits 1 and 3, were not conclusive, that they merely showed blood pressure readings, and that a full medical report was necessary (R. 136, 145). The inadequacy of these medical reports is clearly apparent from a cursory reading.

After the fourth step of the grievance procedure, when the medical evidence of the company and Owens appeared to be conflicting, the Union suggested that Owens go to a doctor of his own choosing, and that the Union would pay the doctor's bill (R. 56). After getting the recommendation of Dr. H. H. Hesser, to whom Owens went voluntarily, Owens selected and went to Dr. Hughes Day, who specialized in heart diseases (R. 57, 155). Dr. Day, following his examination of Owens, reported to the Union that Owens' physical condition was serious and that he was not able to work (R. 100, 101, 187; defendants' Ex. 18). Owens himself conceded in his testimony at the trial that he had had a congenital heart condition practically all his life; that he was born with it and all his folks died with it (R. 70, 157, 158).

Although the medical evidence supporting Owens' position was weak, it is conceivable that if the NBP & DW had taken the case to arbitration it might have prevailed, and Owens might have gotten his job back. Swift & Company does not think so. However, even if this possibility be conceded, it does not justify a finding of bad faith or discriminatory motive on the part of the Union in failing to take the grievance to arbitration. In considering the advisability of carrying the grievance to the fifth step the Union not only had the medical evidence of Swift & Company showing that Owens had severe heart damage and hypertension but also had a substantiating medical re-

port, in detail, from Dr. Hughes Day, who was a heart specialist selected by the plaintiff himself and completely unconnected with Swift & Company. The soundness of the Union's judgment in giving credence to this medical evidence is borne out by the fact that Mr. Owens died on December 8, 1964, from a "cardio vascular accident due to hypertension". It thus appears quite clearly that no factual issue of bad faith or discriminatory motive can be justified solely on the basis of the medical evidence that was in the hands of the Union at the time it determined not to carry Owens' grievance to the fifth step.

It appears, however, that respondent may be contending that a prima facie showing of bad faith was made by Owens' own testimony to the effect that named defendant Manuel Vaca told him about two months after the fourth step meetings on November 16, 1960, that the Union did not have the money to take the grievance to the fifth step and that, if Owens would give him $300.00 to pay the arbitrator, he would take the grievance to the fifth step (R. 30, 80, 154). Owens conceded that at about the same time Vaca told him that the Union couldn't win the case in arbitration (R. 81, 82). Vaca denied having asked Owens for money (R. 126), and Owens admitted that Jamerson, business representative of the Local Union, told him he didn't have to pay money to anyone (R. 154). However, even if Owens' recital of his conversation with Vaca be accepted as true and accurate, the Vaca comments would not justify a finding of bad faith on the part of the Union. In essence they amount to no more than an expression of his belief that the Union couldn't win the arbitration and didn't have money to expend on losing cases in arbitration. It should further be noted that the alleged conversation occurred about two months or more after the original fourth step meeting on November 16, 1960 (R. 154, 155), at which the Union decided that it should arrange a re-

habilitation program for Owens, looking towards rehabilitation at the Heart Association, rather than refer the matter to arbitration (R. 29); and it was after the alleged conversation that Owens went to Dr. Hughes Day, the heart specialist, who examined Owens and advised the Union by letter dated February 6, 1961 (defendants' Ex. 18; R. 187), that Owens was in a rather serious condition and could not work. It is worthy of note that the only request made by Owens that the grievance go to the fifth step was made at the time of his informal conversation with Vaca late in January, 1961 (R. 29, 30).

In any event there was no evidence showing that Vaca had any power or authority to make a request for money or to take the grievance to the fifth step. The contract (plaintiff's Ex. 2; R. 19, 20, 173) between Swift & Company and the National Brotherhood of Packinghouse Workers provided that "the *National Union* may refer the grievance" to the arbitrator in the fifth step (Emphasis supplied). Vaca was president of Local No. 12 (R. 121). Vaca himself testified that as a local Union officer he had no power to decide whether or not the grievance was going to the fifth step (R. 126), and Owens himself testified that he didn't know who had the authority to take the grievance to the fifth step (R. 80). No evidence appeared in the record even suggesting that Vaca had any power or authority to determine whether the grievance went to the fifth step. Defendant Ernest F. Kobett was the representative of the National Union, and it was he who decided against going to the fifth step (R. 138, 142, 143). Likewise Kobett was the one who withdrew Owens' grievance after the National Union's president and attorney, who had reviewed the facts of the case, advised him that the case should be withdrawn (R. 138, 141).

In opposing petitioner's petition for a writ of certiorari to this Court respondent has indicated that the Executive Board voted to submit the grievance to arbitration and that the officers of the Union arbitrarily refused to follow this decision of the Executive Board (respondent's answer brief to petition for a writ of certiorari, pp. 3, 6, 19). At page 3 of respondent's said brief he quotes testimony of witness Jamerson to the effect that the Executive Board voted to take the grievance to the fifth step. Respondent failed to quote the testimony immediately following in which Jamerson stated that he could not recall whether the majority vote of the Executive Board had been in favor of arbitration (R. 94, 95), and other testimony confirmed that the Executive Board did not vote for arbitration (R. 108, 109). In any event the authority to take the grievance to the fifth step, under the terms of the contract, was lodged solely and exclusively in the National Union, and the decision not to refer the matter to the fifth step was made by defendant Kobett, the representative of the National Union (R. 134, 138, 142, 143), who had before him the medical evidence showing Owens' serious disability (R. 145, 147, 148).

It is clearly apparent from the opinion of the Missouri Supreme Court that it never seriously considered the question of whether the plaintiff had presented substantial evidence of bad faith or discriminatory motive on the part of the Union but merely considered whether the plaintiff's evidence could have created a factual issue if the grievance had been submitted to an arbitrator. The Missouri Supreme Court opinion now stands as a precedent that a Union may be liable for damages to a Union member whenever it decides not to submit a grievance to arbitration regardless of the good faith of the Union in refusing to submit the issue to the arbitrator.

B. Successful Collective Bargaining Procedure Requires That the Union Have the Right to Effectively Represent Its Members in the Processing of Grievances So Long As It Acts in Good Faith and Without Discriminatory Motive

The decision of the Supreme Court of Missouri in effect holds that if there is any evidence in a given case that would permit a jury to determine that a grievant had a meritorious claim, then the Union representing him may be found guilty of unfair representation in not carrying the matter through all steps of the grievance procedure and into arbitration. In effect, a jury is asked to pass upon whether or not the grievant's claim did indeed have merit after a Union in its honest judgment and with its thorough knowledge of the particular industrial scene determined that that particular grievance lacked sufficient merit to warrant further processing.

Normal processing of grievances results in an orderly disposition by the Union and the company of almost all grievances before the arbitration stage is reached; but, faced with the possibility of defending a damage suit, with all its expenses and uncertainties, brought by every unhappy grievant whose claim was not processed through the entire grievance procedure, a Union would undoubtedly choose to press a large number of grievances through the entire procedure—including arbitration—regardless of whether the grievance was meritorious or not. The impact of the Missouri Supreme Court opinion, giving in essence every dissatisfied grievant the power to insist that his grievance be processed through all five steps, can readily be appreciated from the statistics shown in the record of this case. According to the evidence in the record relating to the processing of grievances by this Union

at those Swift & Company plants where they represent the employees between September 1, 1961, and August 16, 1963, of a total of 967 grievances filed, 207 were settled in the first step, 214 in the third step, 35 in the fourth step, and only one went to arbitration (R. 138, 139). If it had been necessary to process a large number of these grievances through all five steps, the cost in time and money to the Union, the employees and the Company would have been tremendous. Worse still, it would have resulted in the complete breakdown of the orderly, workable grievance procedure which is of such vital importance to labor-management relations. This destruction of a sound grievance procedure would ultimately hurt employees, unions, and employers. Furthermore, such undermining of the authority and responsibility of the bargaining agent with respect to the administration of the collective agreement immediately could raise a question of the Union's authority in the collective bargaining process itself. It seems to necessarily follow that if every grievant dissatisfied with his Union's handling of his grievance can take his case to court, then an employee dissatisfied with any part or all of a contract negotiated by his Union could be entitled to do likewise.

In *Black-Clawson Co., Inc.* v. *International Assn. of Machinists*, 313 F.2d 179 (2d Cir. 1962), the court had under consideration the individual right of an employee, as distinguished from the right of his Union, to compel an employer to arbitrate his discharge grievance. In holding that he did not, the court in an opinion by Judge Kaufman, stated (l.c. 186):

> "Our conclusion is dictated not merely by the terms of the collective bargaining agreement and by the language, structure, and history of section 9(a),

but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. *Chaos would result if every disenchanted employee, every disturbed employee,* and every employee who harbored a dislike for his employer, *could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration* in the face of clear contractual provisions intended to channel the enforcement remedy through the union. [Citing cases.] 'A union's right to screen grievances and to press only those it concludes should be pressed is a valuable right * * *,' Ostrofsky v. United Steelworkers, 171 F.Supp. at 790, and inures to the benefit of all of the employees." (Emphasis supplied.)

Chaos will also result if every dissatisfied grievant is permitted to test the good faith judgment of his Union in a suit for damages claiming unfair representation without alleging and proving discrimination, fraud, deceit, dishonesty or negligence.

As pointed out by Mr. Justice White in *Humphrey v. Moore,* 375 U.S. 335, 349 (1964):

> "* * * we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. * * * Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Just as in *Humphrey*, in the instant case "As far as this record shows, the Union took its position honestly, in good faith and without hostility or arbitrary discrimination."

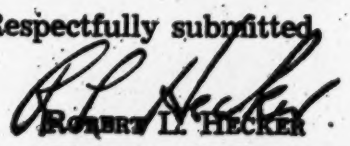
This Court has emphasized the value of the grievance and arbitration procedure as a major factor in achieving industrial peace, its stabilizing influence and that the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards. *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960); and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). This concern for the grievance and arbitration process will go for naught if the decision of the Missouri Supreme Court as it relates to the standard of fair representation is permitted to stand. The use of grievance and arbitration procedures will become so cumbersome, time-consuming, expensive and fraught with such uncertainties and perils that it will fail to serve its purpose in the industrial complex.

CONCLUSION

The decision of the Supreme Court of Missouri establishes a standard of fair representation which seriously undermines the existence of a workable grievance procedure so necessary to the collective bargaining relationship. If it is allowed to stand as a precedent, the grievance procedure will become so meaningless and such chaos will result that the continued effectiveness of the grievance

procedure will be destroyed. The decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,



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